BEFORE THE SECRETARY OF STATE
STATE OF COLORADO

CASE NO. OS 2007-0003

AGENCY DECISION and AMENDED ORDER OF DISMISSAL OF NORTHERN COLORADO VICTORY FUND

IN THE MATTER OF THE COMPLAINT FILED BY COLORADO CITIZENS FOR ETHICS IN GOVERNMENT REGARDING ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY THE NORTHERN COLORADO VICTORY FUND and COMMITTEE FOR THE AMERICAN DREAM

This matter is before Administrative Law Judge (ALJ) Robert Spencer upon the complaint of Colorado Citizens for Ethics in Government (CCEG) that the Northern Colorado Victory Fund (NCVF) and the Committee for the American Dream (CAD) violated Article XXVIII of the Colorado Constitution and § 1-45-108, C.R.S. of the Fair Campaign Practices Act (FCPA) by failing to file reports of electioneering communications (Count I); and that CAD violated Article XXVIII and the FCPA by failing to file itemized reports of membership contributions (Count II).

Procedural History

The Secretary of State received CCEG's complaint February 23, 2007. Pursuant to Colo. Const. art. XXVIII, § 9, the Secretary of State forwarded the complaint to the Office of Administrative Courts February 26, 2007. Hearing upon the complaint was held March 13, 2007. CCEG was represented by its Director, Chantell Taylor, Esq. and by Jason Wesoky, Esq., Brownstein Hyatt & Farber, P.C. CAD and NCVF were represented by Scott Gessler, Esq., Hackstaff Gessler, LLC. Per their joint request, the parties were allowed ten days following the hearing to file written closing arguments. Arguments were filed March 23, 2007, and the matter is now ripe for decision.

Prior to hearing, the parties verbally agreed to voluntarily dismiss NCVF. The verbal agreement was followed by a Stipulation for Dismissal filed March 29, 2007. In response to that stipulation, the ALJ issued a Final Agency Order and Order of Dismissal that was not clear that the dismissal was limited to NCVF. The ALJ corrects that oversight by amending the Final Agency Order and Order of Dismissal dated March 30, 2007 to dismiss only the charges against NCVF.

During the hearing, CCEG made an unopposed motion to dismiss Count II against CAD, which the ALJ granted. As a result, the only remaining charge is the allegation in Count I that CAD failed to file required electioneering communication reports.

Following the close of CCEG's case, CAD made a motion to restrict CCEG's

case to the specific communications described in paragraph 9 of the complaint, and to dismiss any allegation by CCEG related to communications not described in the complaint. The ALJ granted the motion. CCEG then moved to amend the complaint to add several allegations involving electioneering communications regarding other candidates. Because the motion to amend came during trial, the amendment was not one of right, but could only be granted by leave of the court. C.R.C.P. 15(a). Although motions to amend are to be freely granted when justice so requires, the proposed amendment alleged several new violations unrelated to those charged in paragraph 9. Coming as it did during the hearing, the amendment would have unduly prejudiced CAD's ability to defend against the new allegations. The ALJ therefore denied the motion to amend and limited CAD's allegations to those stated in the complaint. *Polk v. Denver Dist. Ct.,* 849 P.2d 23, 26 (Colo. 1993)(In ruling on a motion to amend, the court must consider the totality of the circumstances by balancing the policy favoring the amendment of the pleadings against the burden which granting the amendment may impose on the other parties).

Issue

CAD is a political committee registered with the Secretary of State. During the 2006 election cycle, it spent money buying television advertisements opposing the Democratic candidate for House District 52, Rep. John Kefalas. Between the dates of October 25 and November 4, 2006, CAD spent over $28,000 for 568 such ads in the Fort Collins area, which includes House District 52. Because the ads opposed Rep. Kefalas by name, were broadcast to voters in his district, and were broadcast within 60 days of the general election, they were "electioneering communications" within the meaning of Colo. Const. art. XXVIII, § 2(7)(a). The issue is whether the ads were excepted from the definition of electioneering communications as communications "made by persons in the regular course and scope of their business," and if not, whether CAD reported its spending on the communications as required by Colo. Const. art. XXVIII, § 6(1), § 1-45-108(1)(a)(III), C.R.S., and the Secretary of State's regulations.

Findings of Fact

CAD's anti-Kefalas ads

1. CAD is a political committee registered with the Colorado Secretary of State. Its primary purpose is to support candidates for political office who have a pro-business and pro-property rights agenda, and to oppose those who do not.

2. CAD was established by the Colorado Association of Home Builders (CAHB) to further CAHB's political agenda. CAHB's Director of Government Affairs, Robert Nanfelt, is CAD's registered agent.

3. CAD's sole contributor is CAHB. In the 2006 election cycle, CAHB contributed a total of $237,012 to CAD.

4. During 2006, CAD contracted with Rock Chalk Media LLC to produce and broadcast televised political advertisements, titled "F HD 52 Won't Pay Taxes." The ads

expressly advocated the defeat of the Democratic candidate for House District 52, Rep. John Kefalas, at the November 7, 2006 general election. House District 52 is in the Fort Collins area. CAD opposed Rep. Kefalas because, in CAD's view, he supported a new tax burden upon homeowners that was contrary to CAHB's pro-business pro-property rights agenda.

5. During the period of October 25, 2006 through November 4, 2006, Rock Chalk Media, on behalf of CAD, arranged with ComCast Spotlight to broadcast 568 ads opposing Rep. Kefalas to an audience that included voters within House District 52. By invoices dated October 30, 2006 and November 8, 2006, CAD was billed a total of $28,435 for these ads. CAD paid the invoices.

6. "Any person" that spends more than $1000 per calendar year on "electioneering communications" must report to the Secretary of State the amount expended on such communications, and the name and address of any person that contributed more than $250 per year to the person making the electioneering communication. A political committee, such as CAD, is a "person" for the purposes of this reporting obligation.

7. Electioneering communications include any televised broadcast that unambiguously refers to a candidate for public office, is broadcast within 60 days prior to a general election, and is broadcast to an audience that includes members of the electorate for that public office. CAD's televised ads meet this definition of electioneering communications. The ads were broadcast within 60 days prior to the November 7th general election, unambiguously referred to Rep. Kefalas by name, and were broadcast to voters within House District 52.

CAD's routine activity

8. As a political committee, CAD's purpose is to support or oppose political candidates depending upon whether the candidates' views align with CAD's and CAHB's political philosophy. It does this by donating money to, and running political ads in favor of, candidates it supports; and by running political ads opposing candidates it does not support. CAD donated money to a significant number of candidates for political office in 2006, and paid for advertisements supporting or opposing several other candidates in addition to Rep. Kefalas.

9. An ad is not an electioneering communication if it was made in the regular course and scope of a person's business.

10. CAD is not engaged in business for livelihood, profit or gain. It is not a corporation or any other commercial enterprise. It does not produce, market or sell any product or service, and does not engage in any profession or occupation with a view toward making a profit or accumulating a surplus. It exists solely to influence the outcome of elections.

CAD's reports

11. Apart from its alleged duty to file reports of its electioneering

communications, CAD, as a political committee, was also obligated to file with the Secretary of State reports of all contributions received, including the name and address of each person who contributed twenty dollars or more, and all expenditures made and obligations entered.

12. During 2006, CAD filed a number of reports with the Secretary of State of expenditures made and contributions received. In six separate reports filed on or before December 6, 2006, CAD reported every contribution received from CAHB used to fund electioneering communications. Exhibit 1, pp. 15, 17, 22, 34, 46, 51, 52. It also reported the expenditures it made to Rock Chalk Media to produce and broadcast the ads against Rep. Kefalas. Exhibit 1, p. 50.

13. CAD did not file a separate electioneering report, and still had not filed such a report as of the day of hearing. CAD's reports of the expenditures to Rock Chalk Media did not identify Rep. Kefalas' by name as the target of the ads. Rather, the expenditure reports referred to the purpose of the payments to Rock Chalk Media as "Direct Advocacy Media Buy – HD-52."

14. In investigating the grounds for CCEG's complaint, its Executive Director accessed the Secretary of State's web site to locate evidence of unreported electioneering communication by CAD. CCEG's Executive Director, who is an attorney with knowledge of the campaign finance laws, was able to locate CAD's report of its expenditures to Rock Chalk Media in less than 15 minutes.

Discussion and Conclusions of Law

Colorado's campaign finance laws

The primary campaign finance law in Colorado is Article XXVIII of the Colorado Constitution, which was approved by the people of Colorado in 2002 as Amendment 27. Article XXVIII imposes contribution limits, encourages voluntary spending limits, imposes reporting and disclosure requirements, and vests enforcement authority in the Secretary of State. Colorado also has statutory campaign finance law, known as the Fair Campaign Practices Act (FCPA), §§ 1-45-101 to 118, C.R.S., which was originally enacted in 1971, repealed and reenacted by initiative in 1996, substantially amended in 2000, and again revised by initiative in 2002 as the result of the adoption of Article XXVIII. The Secretary of State, pursuant to regulations published at 8 CCR 1505-6, further regulates campaign finance practices.

Electioneering Communications

The sections of Article XXVIII at issue are those pertaining to "electioneering communications." Electioneering communication is defined in § 2(7)(a) to include any communication "broadcasted by television … that: (I) Unambiguously refers to any candidate; and (II) Is broadcasted … within … sixty days before a general election; and (III) Is broadcasted to … an audience that includes members of the electorate for such public office." However, electioneering communication does not include "Any communication by persons made in the *regular course and scope of their business*."

Section 2(7)(b)(III) (*italics* added*).* Any person who expends one thousand dollars or more per calendar year on electioneering communications must submit reports to the Secretary of State as required by § 6(1) of Article XXVIII, § 1-45-108(1)(a)(III), C.R.S. of the FCPA, and Rule 9 of the Secretary of State's regulations. The last report is due 30 days after the general election. Section 6(1); § 1-45-108(2)(E), C.R.S.

CAD's anti-Kefalas ads were electioneering communications

CAD's television ads opposing Rep. Kefalas were electioneering communications within the meaning of Article XXVIII, § 2(7)(a) because they unambiguously referred to Rep. Kefalas by name, were broadcast within 60 days before the general election, and were broadcast to voters within his district.

CAD nonetheless argues that because the ads "expressly advocated" Rep. Kefalas' defeat, they were not electioneering communications. In support of its argument, CAD relies upon the voter education handbook (the Bluebook) prepared by the General Assembly Legislative Council to explain proposed Amendment 27. The Bluebook explains that the electioneering communication provisions were intended to address political advertisements that refer to a candidate "without specifically urging the election or defeat of the candidate."[1] CAD asserts that because the ads expressly urged the defeat of Rep. Kefalas, they could not meet the Bluebook definition of electioneering communications. CAD's argument is not persuasive. While the Bluebook explanation may be an indication of voter intent, it is not the law. The law is found in the language of Article XXVIII, § 2(7)(a) which expressly defines "electioneering communication" as any communication that "unambiguously refers to any candidate." Section 2(7)(a) makes no distinction between express advocacy and advocacy that is not express, provided the candidate is unambiguously identified. When language of a constitutional amendment is clear and unambiguous, the amendment must be enforced as written. *Davidson v. Sandstrom,* 83 P.3d 648, 654 (Colo. 2004). Although the court's obligation is to give effect to the intent of the electorate, in giving effect to that intent the court must look to the words used, reading them in context and according them their plain and ordinary meaning. *Sanger v. Dennis,* 148 P.3d 404, 412 (Colo. App. 2006). Courts are therefore bound by the words of the provision itself, and "they are not to suppose or hold the people intended anything different from what the meaning of the language employed imports." *Interrogatories Relating to the Great Outdoors Colorado Trust Fund*, 913 P.2d 533, 550 (Colo. 1996)(Lohr, J., dissenting and quoting *People ex rel. Carlson, Governor v. City Council of Denver,* 60 Colo. 370, 377, 153 P. 690, 692 (1915)).

The "regular course and scope of business" exception does not apply

The main thrust of CAD's defense is that regardless of whether its ads met the definition of electioneering communications in § 2(7)(a), they are exempt under § 2(7)(b)(III). CAD argues that because its purpose and primary activity is to support and

[1] Legislative Council of the Colo. Gen. Assembly, Research Pub. No. 502-1, *2002 Ballot Information Booklet*, at 3-4.

oppose candidates, its purchase of the anti-Kefalas falls squarely within the § 2(7)(b)(III) "regular course and scope of business" exception. The ALJ concludes that CAD is not a "business," and therefore the exception does not apply.

"Business" is not defined in Article XXVIII or the FCPA. However, in *Lindner Packing & Provision Co. v. Industrial Comm. of Colo.*, 99 Colo. 143, 60 P.2d 924 (Colo. 1936), the court recognized that the word "business" may have different meanings depending upon the context in which it is used. On the one hand, the term may imply "an occupation of one's time in some activity with an objective of direct financial profit or livelihood accruing out of the activity." *Id.,* at 927. On the other hand, it might be used in the more general sense of "an occupation of one's time in some regular activity that may or may not have the objective of direct financial profit or livelihood." *Id.* The difference between the two meanings is whether the activity has a "profit objective." *Id.* Which meaning is appropriate depends upon the context of the case. *Nicholl v. E-470 Public Highway Authority,* 896 P.2d 859, 874 Colo. 1995)("When construed in statutes or in specific instruments, the meaning of "business" has been held to depend upon the context, the facts of the particular case, the intention of the parties, or upon the purposes of the legislation")(Erickson, J. and Kirshbaum, J. concurring in part, dissenting in part). In the context of the remedial and beneficent purposes of the Workmen's Compensation Act, "business" has been construed in the broad sense. *Lindner, supra* at 927. However, when the context of the legislation was to encourage development of self-insurance pools, the term "business" was narrowly construed to effectuate that purpose. *City of Arvada v. Colorado Intergovernmental Risk Sharing Agency,* 19 P.3d 10, 13 (Colo. 2001)(adopting the *Black's Law Dictionary* definition of "business" as "a commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain.")

In the context of Article XXVIII's business exception, the term must be narrowly construed to effectuate the purpose of Article XXVIII. Section 1 of Article XXVIII states that one of the primary purposes of the amendment was to address the electorate's concern about "significant spending on electioneering communication," and that to address that concern, disclosure requirements were adopted to provide "full and timely disclosure of … funding of electioneering communications, and strong enforcement of campaign finance requirements." The broad definition of "business" urged by CAD defeats this intent by exempting from the reporting requirement virtually every political committee and every other entity whose primary purpose is to influence elections. Exceptions that swallow the rule are not favored. *Fognani v. Young,* 115 P.3d 1268, 1275 (Colo. 2005)(citing *United States v. Peng*, 602 F. Supp. 298, 303 (S.D.N.Y. 1985)); *see also Colorado Common Cause v. Meyer*, 758 P.2d 153, 161-62 (Colo. 1988)(an interpretation that would exclude the great majority of entities from the filing and reporting requirements of the campaign finance law would be virtually irreconcilable with the goal of public disclosure that the statute was designed to accomplish).[2]

[2] In another agency decision, *In the Matter of the Complaint Filed by David Harwood Regarding Alleged Campaign and Political Finance Violations by Senate Majority Fund,* No. OS 2005-0013 (July 29, 2005), another ALJ adopted a definition of "business" that included the polling activity of the non-profit Senate

The kinds of activities that would clearly fall within the narrow exception of § 2(7)(b) include the commercial media producer whose business it is to produce ads, or the TV station whose business includes airing ads. Exempting the activities of these businesses from disclosure does no violence to the intent of Article XXVIII because their role is merely to sell a service, not influence an election. On the other hand, exempting organizations that do exist to influence elections flies in the face of Article XXVIII's intent to disclose such influence.

A broad exemption for entire categories of politically active organizations would also be inconsistent with the language of § 6(1), which imposes the reporting obligation on "any person" who expends more than one thousand dollars on electioneering communications. "Person" is defined in § 2(11) to include any "committee" or "other organization or group of persons." Political committees clearly fall within that definition. Had the electorate intended to exclude from the reach of § 6(1) all political committees and other entities formed to influence elections, it could easily have done so, but it did not. In the absence of such an exception, the ALJ is bound by the plain language which includes political committees. *Davidson v. Sandstrom, supra.*

The ALJ therefore concludes that the business exception does not apply to CAD. CAD's anti-Kefalas ads were electioneering communications subject to the constitutional, statutory and regulatory reporting requirements.

CAD failed to file required electioneering communication reports

CAD argues that even if it is required to report electioneering communications, it satisfied the requirement by the routine reports of contributions and expenditures it was required to file by FCPA § 1-45-108(1)(a)(I). That section requires all political committees to "report … their contributions received, including the name and address of each person who has contributed twenty dollars or more; expenditures made, and obligations entered into by the committee." CAD points out that pursuant to this independent reporting obligation, it duly reported every one of CAHB's contributions and every one of its expenditures to produce and air the anti-Kefalas ads.

The ALJ agrees that it is possible to interpret the electioneering communication reporting obligations of Article XXVIII and the FCPA in a way that requires CAD to do no more than it did. Section 6(1) requires "reports" which include "spending on such electioneering communication, and the name, and address, of any person that contributes more than two hundred and fifty dollars per year … for an electioneering communication." Similarly, § 1-45-108(1)(a)(III) requires a "report" of "the amount expended on the communications and the name and address of any person that contributes more than two hundred fifty dollars per year to the person expending one thousand dollars or more on the communications." The evidence shows that CAD reported all the CAHB contributions used to fund the anti-Kefalas ads, and disclosed all the expenditures it made to produce and air the ads. All this information was reported

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Majority Fund. The ALJ's rationale, however, was not adopted by the court of appeals, *Harwood v. Senate Majority Fund, LLC*, 141 P.3d 962, 964 (Colo. App. 2006).

before the deadline of December 7, 2006. Therefore, CAD's routine contribution and expenditure reports arguably satisfied the electioneering communication reporting requirements of § 6(1) and § 1-45-108(1)(a)(III).

CCEG, on the other hand, argues that CAD failed to meet its reporting obligations because it did not file separate electioneering communication reports, and did not identify the name of the candidate "unambiguously identified" in the ads, as required by Rule 9.3 of the Secretary of State's regulations. Rule 9, in its entirety, reads:

> Electioneering Communications
>
> 9.1 All entities must keep a record of all contributions received for electioneering communications. All contributions received, including non-monetary contributions, of two hundred and fifty dollars or more, during a reporting period shall be listed individually on the electioneering report. [Article XXVIII, Sec. 6(1)]
>
> 9.2 All entities must keep a record of all expenditures made for electioneering communications. All expenditures of one thousand dollars or more per calendar year including name, address and method of communication, shall be listed individually on the electioneering report. [Article XXVIII, Sec. 6(1)]
>
> 9.3 The *name of the candidate*(s) unambiguously referred to in the electioneering communication shall be included *in the electioneering report.* [Article XXVIII, Sec. 2(7)(I)]
>
> 9.4 The unexpended balance shall be reported as the ending balance throughout the election cycle. Unexpended balances from the final report filed thirty days after the applicable election shall be reported as the beginning balance in the next election cycle.

8 CCR 1505-6, ¶ 9 (*Italics* added).

As CCEG points out, Rule 9.3 clearly requires disclosure of the name of the candidate referred to in the ad, and also requires a separate "electioneering report." CAD did not file separate electioneering reports, and although it did disclose in its expenditure report that the payments to Rock Chalk Media were for "Direct Advocacy Media Buy – HD-52," it did not identify Rep. Kefalas by name. CAD therefore did not comply with the requirements of Rule 9.3.

CAD seeks to avoid the requirements of Rule 9.3 by arguing that the Secretary of State "is without authority to add legal requirements not contained in the statute or the constitution." While the ALJ agrees that an agency may not adopt rules that exceed its statutory or constitutional authority, that is not what the Secretary has done.

Article XXVIII, § 8, gives the Secretary of State authority to promulgate rules "relating to filing" of reports required by Article XXVIII. Similarly, FCPA § 1-45-111.5(1), C.R.S. gives the Secretary of State authority to promulgate such rules "as may be

necessary to enforce and administer any provision of this article." Any rules and regulations that a state agency adopts pursuant to statutory rulemaking proceedings are presumed valid. *Wine and* Spirits *Wholesalers, Inc. v. Dept. of Revenue*, 919 P.2d 894, 896 (Colo. App. 1996), *citing Regular Route Common Carrier Conference v. Public Utilities Commission*, 761 P.2d 737 (Colo. 1988). Although no implied powers exist when an agency exceeds its jurisdiction by acting contrary to the Colorado Constitution, or when it acts contrary to express statutory provisions, or when such authority would be in derogation of statutory purpose, or when it does something entirely unrelated to its statutory purpose; an agency does not exceed its jurisdiction by exercising implied authority "to do all which is reasonably necessary to effectuate express duties." *Hawes v. Colorado Division of Ins.,* 65 P.3d 1008, 1017 (Colo. 2003); *Berg v. Colorado State Dept. of Social Services,* 694 P.2d 1291, 1292 (Colo. App. 1984)("The validity of a regulation depends upon whether it is reasonably related to a legitimate use of statute authority, and the burden of establishing unreasonableness is upon the party challenging the regulation.")

Rule 9.3 is an appropriate exercise of the Secretary of State's delegated authority because it is reasonably related to the Secretary's constitutional and statutory authority, and is reasonably necessary to effectuate Article XXVIII and the FCPA's mandate to make electioneering communications transparent to the public. It is not unreasonable for the Secretary of State to require persons making electioneering communications to file separate reports of such communications and identify the candidate in question. Separate reporting and candidate identification provides clarity and transparency that otherwise might be missing if, as here, the report is imbedded in a political committee's routine contribution and expenditure reports. Although CCEG's legally trained Executive Director was able to ferret out CAD's electioneering communications without much difficulty, it would likely be more difficult for the average citizen who is not legally trained to uncover that information if data is buried within routine contribution and expenditure reports rather than being clearly identified in separate reports as "electioneering communications."

Furthermore, Rule 9.3's requirement to specify the name of the candidate "unambiguously referred to" in the electioneering communications enables the Secretary to maintain a web site searchable by candidate name, as required by § 1-45-109(7)(b), C.R.S. (the secretary of state's web site "shall enable a user to produce summary reports based on search criteria that shall include, but not be limited to, the … candidate.") Without requiring disclosure of the candidate "unambiguously identified" in the ads, the Secretary cannot fulfill this obligation.

The Secretary of State's regulations are reasonably related to his authority to enforce the campaign finance laws, and are reasonably necessary to fulfill his constitutional and statutory duties. They are therefore a lawful exercise of his authority.

CAD objects to a requirement for separate electioneering reports because it "would swamp the Secretary and all regulated committees with superfluous burdens." For reasons already explained, the ALJ does not agree that filing separate reports is superfluous. Separate reports help the Secretary of State fulfill his responsibilities and

help make electioneering communication data more transparent and accessible to citizens searching the Secretary's database. However, regardless of the merit of CAD's policy argument, the ALJ must interpret the regulation as written. Rules, like statutes, are to be given effect according to their plain and ordinary meaning. *Regular Route Common Carriers Conference v. Public Utilities Commission,* 761 P.2d 737, 745-46 (Colo. 1988); *Petron Dev. Co. v. Washington Cty. Bd. of Equalization,* 91 P.3d 408, 410 (Colo. App. 2004). The plain and ordinary meaning of Rule 9 requires CAD to file a separate "electioneering report" that includes the "name of the candidate." Whether or not this requirement is the best policy is for the Secretary of State to decide.

Given that Rule 9 is a lawful exercise of the Secretary of State's authority, the reporting obligations of Article XXVIII and the FCPA must be interpreted in light of Rule 9.3. When a statute is silent or ambiguous with respect to a specific issue, courts give great deference to an agency's interpretation of the statute, looking only to whether the agency's regulation is based on a permissible construction of the statute. *Smith v. Farmers Ins. Exchange,* 9 P.3d 335, 340 (Colo. 2000); *see also City and County of Denver v. Board of Assessment Appeals,* 802 P.2d 1109, 111 (Colo. App. 1990), citing *Ingram v. Cooper*, 698 P.2d 1314 (Colo. 1985). An agency's regulation is therefore controlling provided it is consistent with the agency's enabling statute.

Thus, although a possible interpretation of Article XXVIII and the FCPA would require CAD to do no more than it did, that is not the Secretary of State's interpretation. The Secretary of State, through Rule 9, has reasonably interpreted Article XXVIII and the FCPA to require separate electioneering communication reports, and identification of the name of the candidate referred to in the ads. That interpretation is binding. Because CAD did not comply with these reporting requirements, it is subject to sanction.

Sanction

Section 9(2)(a) of Article XXVIII grants the ALJ authority to conduct hearings of alleged violations of Article XXVIII and the FCPA, and if a violation is found, to impose "any appropriate order, sanction, or relief authorized by this article." Section 10(2)(a), in turn, authorizes a fine of $50 per day for each day that a required report is not filed by the close of business on the day due. CAD was obligated to file Rule 9- compliant electioneering communication reports by December 7, 2006, but as of the date of hearing, had not done so. The lapse of time from December 8, 2006 to March 13, 2006 is 95 days, resulting in a possible fine of $4,750.

The ALJ may set aside or reduce the penalty upon a showing of good cause. Article XXVIII, § 10(b)(I). CAD asks that the penalty be set aside entirely. In considering this request the ALJ has considered the following factors:

1. As a political committee, CAD is charged with knowledge of its reporting requirements, including those in the Secretary of State's regulations. Article XXVIII, § 1 contemplates "strong enforcement" of these requirements. Ignorance of the reporting requirements, or failure to comply with them because they are viewed as too burdensome, is no defense.

2. The issue of whether a political committee, like CAD, meets the "regular course and scope of business" exception to electioneering communication reporting is one of first impression. The only reported appellate decision dealing with the obligation of a committee to make electioneering communication reports, *Harwood v. Senate Majority Fund,* 141 P.3d 962 (Colo. App. 2006), left the issue unresolved.

3. Though it did not file a separate electioneering communication report, CAD did file routine expenditure and contribution reports that included most of the required electioneering communication information. There is no evidence CAD willfully attempted to hide its involvement in the electioneering communications at issue.

4. There is no evidence CAD has been previously sanctioned for reporting violations.

In light of these factors, the ALJ finds good cause to reduce the penalty to $1000.

Agency Decision

The Final Agency Order and Order of Dismissal dated March 30, 2007 is amended to reflect only the dismissal of NCVF.

The remaining party, CAD, violated electioneering communication reporting requirements of Colo. Const. art. XXVIII, § 6(1) and FCPA § 1-45-108(1)(a)(III) by failing to file with the Secretary of State separate electioneering communication reports and failing to identify by name the candidate targeted in its communications, for a period of 95 days from December 8, 2006 through March 13, 2007. Pursuant to Colo. Const. art. XXVIII, § 10(2), the ALJ imposes a penalty of $1000. This decision is subject to review by the Colorado Court of Appeals, pursuant to § 24-4-106(11), C.R.S. and Colo. Const. art. XXVIII, § 9(2)(a).

Done and Signed
April 18, 2007

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ROBERT N. SPENCER
Administrative Law Judge

Digitally recorded in courtroom #1
Exhibits admitted
For complainant: exhibits A-F, H, J, K
For respondents: exhibits 1, 2

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the above **AGENCY DECISION and AMENDED ORDER OF DISMISSAL OF NORTHERN COLORADO VICTORY FUND** by placing same in the U.S. Mail, postage prepaid, at Denver, Colorado to:

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and

William Hobbs
Secretary of State's Office
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on this ___ day of April 2007.

_____
Technician IV